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In the Supreme Court of the United States

OCTOBER TERM, 1972 72-102

AUNT MID, INC.,

Petitioner,

vs.

FJELL-ORANJE LINES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ZEAMORE A. ADER, ESQ.
DAVID LINCOLN ADER, ESQ.
ADER & ADER
11 South LaSalle Street
Chicago, Illinois 60603
312-726-6611
Attorneys for Petitioner

DAVID LINCOLN ADER
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO.

AUNT MID, INC.,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

All Italics ours; (App.) means Appendix to this Petition; (R. App.) means Appendix from Court of Appeals.

Petitioner Aunt Mid, Inc., an Illinois Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on February 8, 1972, (App. 1); petitioner filed petition for rehearing which was denied by the order entered on April 19, 1972, on which date the judgment became final.

THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 458 F.2d 712 and appended to this petition. (App. et seq.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on February 8, 1972, and became final April 19, 1972, by denial of Plaintiff's petition for rehearing (App. 21).

The jurisdiction of this Court is invoked under the provisions of Section 1254 of the Judicial Code, (28 U.S.C. Sec. 1254). (App. 23).

STATUTES INVOLVED

The various statutes involved are listed in the index and set forth in the appendix.

QUESTIONS PRESENTED

1. Was the decision of the Court of Appeals invalid, because the division of the Court was comprised of two qualified and active judges, only, not three as required by 28 U.S.C. §46 (b), and therefore not legally constituted?

2. Did the determination of Appellant's appeal by a two judge court impose a discriminatory burden on Appellant heavier than on other appellants appearing before United States Courts of Appeals of three judge divisions, because Appellant was required to obtain a unanimous vote of the two judges for reversal while Appellants before three judge divisions need only obtain a majority vote, and did this make a judicial violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

3. Were the findings of fact entered by the trial court a nullity because they were not drafted by the Court in accordance with Rule 52(a), F.R.C.P. but were drafted by counsel for the prevailing party and perfunctorily accepted by the Court *verbatim;* and was this an unconstitutional delegation of the judicial function?

4. Did the Court of Appeals err in imposing the strict "clearly erroneous" rule in this case?

5. Did the Court of Appeals err in affirming findings of fact which were internally inconsistent and inaccurate and which findings were recognized by the Court of Appeals in its opinion to be internally inconsistent and inaccurate?

6. Did the Court of Appeals disregard the decisions of the United States Supreme Court in affirming the district court which failed to impose on defendants its burden to prove that they, the carriers, had exercised due care in carrying and protecting the cargo and to provide a seaworthy ship?

STATEMENT OF THE CASE

This appeal arises from two admiralty and maritime actions brought in the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1333 (App. 23) by Petitioner Aunt Mid, Inc., against defendant companies and their vessels M/V Sirefjell and M/V Pra River for damage to cargoes of cabbages shipped from Rotterdam, Holland, to the Port of Chicago, on these vessels. The cabbages in question were shipped from Holland in April and were unloaded 24 to 26 days later. The cabbages were placed on board the vessels in apparent good order and condition (Pl. Ex. 2, 6, R. App. 220-1) and were out-turned in a completely deteriorated state (R. App. 102, 103, 105, 121, 123). The cabbages were booked to be carried in ven-

tilated stowage on both ships (Pl. Ex. 2, 6). Testimony of the only two witnesses with personal knowledge of the loading, care and handling of the cargo on board the ships was introduced at the trial by deposition (R. App. 171, et seq., 219 et seq.). One deposition was given by the Supercargo who loaded defendant vessel Pra River. He testified that he did not know the character of the cargo which he was stowing and that he stowed it in accordance with its destination and not in accordance with its nature and requirements. (R. App. 221, 222). He further testified that this cargo of perishable, edible cabbages was stowed as ordinary general cargo which by definition excludes edibles. (R. App. 219, 220). He said that he stowed the cabbages (R. App. 222), that some of the cabbages were stowed adjacent to the engine-room bulkhead (R. App. 149, 222-3; Pl. Ex. 33), where the temperature is approximately 20° higher than that in the rest of the ship (R. App. 142); that he did not inspect the ventilation in that hold (R. App. 221), nor did he allow for circulation around the cabbages, but stowed the hold full (R. App. 222), and flush up against plywood sheets (R. App. 222-3). He stowed the cabbages over baler twine which itself gives off heat. (Pl. Ex. 33, R. App. 142.)

The handling and care of the cabbages aboard the other ship, the Sirefjell, was recounted by the Chief Mate in charge of stowage who testified that the cabbages were placed in a refrigerator compartment without refrigeration until spoiled. (R. App. 175, 182, 187). He testified that the refrigerator compartment did not have the required forced air ventilation (R. App. 181, 189, 191-2), although forced air is necessary if ventilated cargo is to be stowed inside (R. App. 156). The refrigerator compartment was packed full to the roof (R. App. 189) with the cabbages and textiles for Montreal and Cleveland (Pl. Ex. 35) in such a way that the Chief Mate was unable to inspect the cargo until

arrival at the Port of Cleveland (R. App. 177, 188), and although the Chief Mate became aware that the cabbages were having difficulty outside of Montreal (R. App. 182), he made no effort to see them until the ship arrived at the Port of Chicago (R. App. 175).

Other than the depositions of these two eye witnesses and participants in the loading, handling and care of the cabbages, the only other evidence introduced concerning what occurred on board the ships was by answers to interrogatories, answers to notice to admit and by such other documents as the ship's plan, and stowage plans (R. App. 128, et seq. Pl. Ex. 33, etc.).

At the conclusion of the trial, although no knowledgable competent witness and no documentary proof was introduced to contradict the deposed testimony of the two ship's crew members and ship's documents, the court mechanically entered without change the findings of fact drafted by counsel for the prevailing party which stated that the vessels were seaworthy and there was no negligence (R. App. 32-42).

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, but at the time the decision was made in this cause by the division hearing the case, it was comprised of only two active and qualified judges, the third, Judge Otto Kerner having, at his request, been relieved of all duties in the division and the Court by Chief Judge Swygert, before decision or opinion in this case (App. 22), due to Judge Kerner being under federal indictment.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE APPELLATE COURT WAS INVALID BECAUSE THE APPELLATE DIVISION COMPRISING ONLY TWO QUALIFIED AND ACTIVE JUDGES WAS NOT LEGALLY CONSTITUTED (28 U.S.C. §46(b)).

AND

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN USING A DIVISION OF TWO JUDGES INSTEAD OF THE THREE JUDGES REQUIRED BY LAW IS IN CONFLICT NOT ONLY WITH THE APPLICABLE RULINGS OF THIS COURT BUT ALSO IS IN CONFLICT WITH THE RULINGS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The United States Code provides: "In each circuit the court may authorize a hearing and determination of cases and controversies by separate divisions *each consisting of three judges.*" 28 U.S.C. 46(b). (Emphasis added). For a division to be legally constituted, there must be three active and qualified judges at all relevant times. A division with a membership of less than three judges is not empowered to make decisions. As was said in *Allen* v. *Johnson,* 391 F.2d 527, 531 (5th Cir. 1968): "This fits neatly into the underlying basic structure of the Court of Appeals. Their work is ordinarily to be—and today *must be*—done by three judge panels." (Emphasis added).

Although the opinion of the United States Court of Appeals for the Seventh Circuit rendered in this case states that "Judge Kerner heard oral argument, but did not participate in adoption of this opinion," Judge Otto

Kerner was at his own request and after his indictment (App. 22), relieved from active service by Chief Judge Luther M. Swygert of this Circuit, both in this division and from the Court in general, prior to decision in this case. Therefore, at the time that the decision was made and the opinion adopted, the division lacked the requisite three judges and was not duly constituted according to law. The division could not validly decide the instant case while illegally constituted, and the opinion is void. This Court has repeatedly enforced this principle.

In *Moran* v. *Dillingham,* 174 U.S. 153 (1899), this Court held a judge incompetent to sit on an appeal due to the provisions of the Act of March 3, 1891, C. 517, §6 and §3, because he had participated in the case below. This Court held that it was not for the judiciary to disregard or fritter away the intention of the legislature, and continued:

> The necessary conclusion is that Judge Pardee was incompetent to sit on the appeal in question, and the decree in which he participated was not made by a court constituted as required by law; and therefore this court, without considering whether that decree was or was not erroneous in other respects, orders the *Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to the court to be there heard and determined according to law by a bench of competent judges. Id.* at 158.

In *William Cramp & Sons Ship & Engine Building Company* v. *International Curtiss Marine Turbine Company,* 228 U.S. 645 (1913), a case wherein it was manifest on a Petition for Certiorari that the judgment set to be reviewed was rendered by a court improperly constituted, the Court held:

> As the considerations just stated demonstrate that the case was tried and disposed of below, by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute, we think it

> plainly results that an error of so grave a character and involving considerations of such public importance was committed as to cause it to be our duty to allow the writ of certiorari, without at all considering for the purpose of such allowance the questions urged concerning the merits of the cause. *Id.* at 650.

Thus, in the case at bar, the decision of the Circuit Court of Appeals was not rendered by a duly constituted panel of three judges as required by 28 U.S.C. 46(b), there being a division of two judges only, and the decision conflicts not only with the applicable rulings of this Court (*Moran* v. *Dillingham*, 174 U.S. 153 (1899); *William Cramp & Sons Ship & Engine Building Company* v. *International Curtiss Marine Turbine Company*, 228 U.S. 645 (1913)), but also is in conflict with the ruling of the United States Court of Appeals for the Fifth Circuit (*Allen* v. *Johnson*, 391 F.2d 527 (5th Cir. 1968)). Also the need to avoid confusion in the law on this point, is of national need and importance and calls for the supervision of this Court.

II.

THE DETERMINATION OF APPELLANT'S APPEAL BY A TWO JUDGE COURT IMPOSED A DISCRIMINATORY BURDEN ON APPELLANTS HEAVIER THAN ON OTHER APPELLANTS APPEARING BEFORE THREE JUDGE COURTS AND THEREBY CAUSED A JUDICIAL VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellant appealed to reverse the decision of the United States District Court. Only two judges of the Court of Appeals participated in making the decision on appeal, since the third judge at his own request was relieved of

his duties both from the division and from the entire court prior to a decision in the cause. Since only two judges participated in reaching a decision on appeal (and a judgment is affirmed unless there are more votes for reversal than for affirmance), appellant was compelled to obtain a unanimous vote to be successful, while other appellants before three judge courts need obtain only a majority of votes to secure reversal.

Had a third judge participated in the deliberation prior to the decision, he might have convinced one of the other judges to join with him in reversal, or he may have joined another judge in voting for reversal. However, with only two judges participating, if one desired to reverse and the other did not, the district court would still be affirmed by this split vote.

A unanimous vote is a far higher and more difficult standard to meet than a majority vote, and it placed the Appellant in a far more rigorous situation than any other appellant. Equal protection of the law requires that all persons subject to the law be treated like others in the same circumstances, both as to privileges and liabilities imposed. *Hayes* v. *Missouri,* 120 U.S. 68, 71-2 (1887), and commands like access to justice in the courts as between people similarly situated, with no greater burden on one than on others. *Barbier* v. *Connolly,* 113 U.S. 27, 31 (1885). Appellant in this case was treated differently from appellants in other cases. He was subjected to a standard of judicial unanimity as opposed to a simple majority required in other appeals, a clear violation of equal protection.

Even if it were assumed *arguendo,* and contrary to the facts of this case, that the Seventh Circuit panel was lawfully constituted, the statutory authorization of 28 U.S.C.

§46(d) that a majority of three judges constitutes a quorum—and a quorum can only act on behalf of a lawfully constituted whole—must be interpreted as referring only to administrative duties, since the unique function of deciding to affirm or reverse must be made with full interaction and participation of at least three active and qualified judges. *Allen* v. *Johnson,* 391 F.2d 527 (5th Cir. 1968). To do otherwise would put some appellants under the higher standard of judicial unanimity while others need convince only two out of three judges, a clear violation of equal protection. Furthermore, this situation is clearly distinguished from occasions when judges have died or retired having expressed themselves and participated in the decision-making process but prior to publication of the opinion. In this case only two judges participated in the decision-making process, the third judge having left active service on the court before the court reached its decision.

One of the prime duties and obligations of this Court is to ensure to each individual the equal protection of the laws guaranteed by the Constitution. This is particularly important in the case at bar because the Appellant seeks protection against an inequality created by the federal judicial system itself, which this Court is charged with supervising.

III.

THE FINDINGS OF FACT ENTERED BY THE TRIAL COURT BELOW WERE A NULLITY BECAUSE THEY WERE NOT DRAFTED BY THE COURT BUT BY COUNSEL FOR THE PREVAILING PARTY IN AN UNCONSTITUTIONAL DELEGATION OF THE JUDICIAL FUNCTION,

AND

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE RULINGS OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD, FOURTH AND TENTH CIRCUITS, AND ANNULS 28 U.S.C. F.R.C.P. 52(a).

The trial judge requested the prevailing counsel to compose findings of fact and conclusions of law to support a decision in their clients' favor, and the judge immediately signed and entered the said findings of fact and conclusions of law verbatim, without change, as drawn by the prevailing counsel. Plaintiff's constitutional right to due process of law was thereby violated. The rules of federal procedure command that the trial court shall find the facts. 28 U.S.C. F.R.C.P. 52(a) (App. 25) In this rule it is the court which is commanded to make findings of fact. The command is unequivocal: "The court shall find," *not* "the prevailing parties shall find" the facts. *Roberts* v. *Ross,* 344 F.2d 747, 751-2 (3rd Cir. 1965). Furthermore, the United States Constitution charges the judge with the performance of the judicial function.

The United States Supreme Court is charged with both the protection and vindication of constitutional rights under the United States Constitution and with the administration of justice in the federal courts. The importance of prohibiting the delegation of the judicial function is of major importance to the nation as a whole. As the Seventh Circuit Court of Appeals stated in *Smith* v. *Dental Products Co.,* 168 F.2d 516, 519 (7th Cir. 1948), regarding the requirement that the court make the findings of fact under Federal Rule of Civil Procedure 52(a):

> The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have a decision from the agency having jurisdiction

> upon the merits; upon testimony submitted by witnesses whom the trial tribunal has seen and heard. *Id.* at 519.

The Court of Appeals for the Tenth Circuit has stated in *Featherstone* v. *Barash,* 345 F.2d 246, 249 (10th Cir. 1965), that one of the important purposes of the rule that the court find the facts is to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute. The Tenth Circuit points out that the trial court is a most important agency of the judicial branch precisely because it bears the responsibility of ascertaining the facts. *Accord: Lemelson* v. *Kellogg Co.,* 440 F.2d 986, 988 (2nd Cir. 1971). This purpose of the rule is certainly not served if the judge delegates the fact finding function and places it with the prevailing counsel: The Constitution charges the judge with the performance of the judicial function.

> It seems to me that the statement of findings and conclusions is of the very essence of the judicial function and that it should not be surrendered by the judge to counsel, however able. Every part of the judicial function should be impartially discharged. It is impossible for counsel in a case in which they are engaged to do anything impartially.
>
> • • •
>
> I have discovered that my thought in this connection is not novel. Several of the supreme courts of the states have said the same thing better than I have said it. Otis, *Improvements in Statement of Findings of Fact and Conclusions of Law,* 1 F.R.D. 83, 85 (1940).

In *Platt* v. *U.S.,* 163 F.2d 165, 168 (10th Cir. 1947), the Tenth Circuit held that the parties could not stipulate to the findings of fact between themselves. If the parties may not jointly relieve the court of its judicial function *a fortiori* one party alone may not do so. *Chicopee Mfg. Corp.* v. *Kendall Co.,* 288 F.2d 719, 724-5 (4th Cir. 1961).

The trial judge in this case did not make independent findings of facts of his own but, after the trial, delegated the complete function of making the findings of facts to counsel for the prevailing party and entered them of record immediately, mechanically and verbatim as drawn by counsel. A new trial should be held in which the judge shall find the facts.

IV.

SINCE THE MOST SIGNIFICANT EVIDENCE BEFORE THE TRIAL JUDGE WAS BY DEPOSITION AND DOCUMENTATION, AND SINCE THE FINDINGS OF FACT WERE DRAFTED BY COUNSEL FOR THE PREVAILING PARTY AFTER THE TRIAL, AND SINCE QUESTIONS RAISED ON APPEAL WERE MIXED QUESTIONS OF LAW AND FACT, THE COURT OF APPEALS ERRED IN ADHERING TO THE "CLEARLY ERRONEOUS" RULE AND IN DOING SO PUT ITS DECISION IN CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEALS FOR THE SECOND, THIRD, FOURTH, FIFTH, SIXTH AND NINTH CIRCUITS, AND WITH ITS OWN EARLIER DECISIONS.

A.

FINDINGS OF FACT DRAFTED AFTER TRIAL BY THE PREVAILING PARTY ARE, ACCORDING TO THE DECISIONS OF THE SECOND, THIRD AND FOURTH CIRCUITS, NOT ENTITLED TO THE "CLEARLY ERRONEOUS" PROTECTION AFFORDED FINDINGS MADE BY THE TRIAL JUDGE HIMSELF.

Findings of fact are normally protected by the clearly erroneous rule because they manifest the thinking and analysis of the judge, the inferences raised from the evidence, his view of the credibility of witnesses appearing before him, and the care, understanding and appreciation

which the judge took of the matter before him. However, when counsel for the prevailing party drafts the findings of fact and they are entered mechanically and verbatim by the trial judge as in the case at bar, they are only a cold recounting of the proceedings and in reality nothing more than an apology and justification for winning counsel. While the Seventh Circuit has adhered to the clearly erroneous rule in these circumstances, the Second, Third and Fourth Circuits have held that a lower standard is proper, that the findings may be more easily rebutted, and that the Court of Appeals can more readily substitute its judgment for that of the trial court. *Red Star Towing and Transportation Company* v. *The Hudson,* 219 F.2d 307, 309 (2nd Cir. 1955); *Roberts* v. *Ross,* 344 F.2d 747, 752 (3rd Cir. 1965); *The Severance,* 152 F.2d 916, 918 (4th Cir. 1945).

B.

THE COURT OF APPEALS IS AS ABLE TO DETERMINE THE EVIDENCE HERE AS THE TRIAL JUDGE WHEN, AS IN THIS CASE, THE CRUCIAL EVIDENCE AND/OR SUBSTANTIALLY ALL OF THE CREDIBLE EVIDENCE IS BY DEPOSITIONS AND DOCUMENTS, ACCORDING TO THE DECISIONS OF THE FIFTH, SIXTH AND NINTH CIRCUITS, WHICH ARE ALL IN CONFLICT WITH THE SEVENTH CIRCUIT ON THIS POINT.

The clearly erroneous standard does not apply where the significant part of the testimony and evidence is by transcript of testimony and depositions and written documents placed in evidence as exhibits. The findings are not protected by the clearly erroneous rule in this case because the trial judge below was faced with written documents and depositions which gave him no opportunity to view those witnesses giving that testimony. Viewing of

witnesses where the significant testimony is by deposition is no more open to judgment on credibility by the trial judge than the appellate court. As the Court of Appeals for the Ninth Circuit said in *The Ernest H. Meyer,* 84 F. 2d 496, 501 (9th Cir. 1936):

> It is obvious that, where the testimony is in part in deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses, there cannot be a balancing of credibility between the two. In such a case, and where . . . substantially all of the evidence pertinent to the finding is given by deposition, the presumption is of lesser weight and more easily may be rebutted.

Accord: San Pedro Compania Armadoras, S. A. v. *Yannacopoulos,* 357 F.2d 737 (5th Cir. 1966); *Seagrave Corp.* v. *Mount,* 212 F.2d 389 (6th Cir. 1954). Even the Seventh Circuit in earlier decisions recognized the correctness of this position. *Fargo Glass & Paint Co.* v. *Globe American Corp.,* 201 F.2d 534 (7th Cir. 1953). Thus the standard applied by the Court of Appeals in this case was contrary to its prior decisions and in conflict with the Fifth, Sixth and Ninth Circuits.

C.

FINDINGS OF FACT RELATING TO NEGLIGENCE, SEAWORTHINESS, SHIPPER'S FAULT AND DEVIATION ARE ALL MIXED QUESTIONS OF LAW AND FACT AND AS SUCH ARE REVIEWABLE AS A QUESTION OF LAW AND THIS HAS BEEN RECOGNIZED BY THE SEVENTH CIRCUIT IN EARLIER OPINIONS AS WELL AS THE APPELLATE COURTS IN THE SECOND AND FIFTH CIRCUITS AND THUS THE SEVENTH CIRCUIT ERRED IN THIS CASE IN MAINTAINING CLEARLY ERRONEOUS RULE.

Negligence, seaworthiness, shipper's fault and deviation are all questions which are answered by applying facts against a legal standard. All of these questions are of

mixed law and fact and the clearly erroneous rule does not apply. *Manning* v. *M/V Sea Road*, 417 F.2d 603, 607 (5th Cir. 1969); *Chandler* v. *U.S.*, 226 F.2d 403 (7th Cir. 1955). This principle was clearly stated by the Appellate Court for the Second Circuit in the *Great Atlantic and Pacific Tea Co.* v. *Brasileiro*, 159 F.2d 661, 665 (2nd Cir. 1947) as follows:

> [A] finding of negligence is not a finding of fact which must be "clearly erroneous" to be subject to review. . . . [T]he decision involves a comparison of the contrasted values; the necessary precautions and the stake; and that in turn demands the setting of a standard, a norm, an imperative, which is the usual hallmark of a jural act. Certainly such a decision is not like a decision of fact uncolored by an element of choice of fiat. We are therefore free to exercise our own judgment. . . .

V.

THE SEVENTH CIRCUIT VIOLATED THE PRECEDENT OF THE UNITED STATES SUPREME COURT AND CONFLICTED WITH DECISIONS OF THE EIGHTH CIRCUIT BY REFUSING TO HOLD THE DISTRICT COURT'S FINDINGS CLEARLY ERRONEOUS WHEN IT CLEARLY IMPLIED IN ITS OPINION THAT THE FINDINGS WERE INTERNALLY INCONSISTENT AND INACCURATE.

The Court of Appeals for the Seventh Circuit stated in its opinion:

> Aunt Mid contends that the district court's conclusion is inconsistent with its findings and with the expert testimony at trial. We cannot deny that there was some confusion and confliction. . . . The conflicts illustrate the necessity for resolution thereof on a credibility basis by the district court. (App. 10.)

Where the court is in conflict with itself by adopting internally inconsistent findings, and where the findings conflict with its own conclusion, the credibility of witnesses play no part. The findings display the court's confusion and inconsistency and are therefore undoubtedly clearly erroneous.

The Court of Appeals for the Seventh Circuit further states in its opinion:

> Even if, as Aunt Mid urges, the district court's findings are not completely internally consistent and do contain a few inaccurate summaries of the testimony, we conclude that they sufficiently inform us of the evidentiary basis for the district court's decision. (App. 11.)

These inaccuracies and inconsistencies concern facts which are crucial and pivotal to the determination of the major issues in this case.

Logic dictates that findings which are internally inconsistent and conflict with each other cannot all be right; some are clearly erroneous. "Inaccurate summaries" of the testimony are by definition clearly erroneous. The trial court's decision must stand or fall on its findings. In *U.S.* v. *Singer Mfg. Co.*, 374 U.S. 174, 192, 194-5, n.9 (1962) this Court said: "the trial court's findings, as we have noted, are inconsistent in some respects . . ." and held that only one set of the inconsistent facts could be true and that those conflicting therewith were clearly erroneous. There are internal inconsistencies in the findings in the case at bar and a new trial is therefore required. *Freightways, Inc.* v. *Stafford*, 217 F.2d 831, 835 (8th Cir. 1955).

The Seventh Circuit violated the decision of the United States Supreme Court and decided contrary to decisions in the Eighth Circuit by not referring this case for a new

trial due to the inconsistent findings of fact which made these findings clearly erroneous by definition. To vindicate its own decision and guarantee appellants a decision supported by the evidence in accordance with due process, the United States Supreme Court should take jurisdiction of this matter and review it for possible reversal and re-trial.

VI.

THE COURT OF APPEALS CLEARLY DISREGARDED THE AUTHORITY OF THE UNITED STATES SUPREME COURT IN SCHNELL v. THE VALLESCURA, 293 U.S. 296 (1934) AND MISSOURI & PACIFIC R.R. CO. v. ELMORE & STAHL, 377 U.S. 134 (1964) WHEN, ALTHOUGH SPECIFICALLY NOTING THAT DEFENDANTS DID NOT UNDERTAKE THEIR BURDEN TO PROVE DUE CARE AND SEAWORTHINESS, IT DID NOT REVERSE THE DISTRICT COURT AND FIND DEFENDANTS LIABLE,

AND

THE COURT OF APPEALS WAS IN CONFLICT WITH THE AFORESAID AUTHORITY OF THE UNITED STATES SUPREME COURT BY NOT REVERSING THE DISTRICT COURT WHICH ENTERED FINDINGS OF FACT AND CONCLUSIONS OF LAW THEREON FINDING DEFENDANTS FREE OF NEGLIGENCE AND THEIR VESSEL SEAWORTHY, WHEN DEFENDANTS NEITHER SHOULDERED THEIR BURDEN OF PROOF NOR PROVED DUE CARE AND SEAWORTHINESS, AND SUCH FINDINGS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The district court's decision on the question of the ships' negligence contravened the United States Supreme Court decision in *Schnell* v. *The Vallescura,* 293 U.S. 296 (1934). In *Schnell* v. *The Vallescura,* the Court held:

> In general, the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. • • • Similarly, the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril. • • • The carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability. *Id.* at 303, 306, 307.

The United States Supreme Court reiterated this principle in *Missouri Pacific R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134 (1964), which was founded on a statute containing the same language as the relevant provisions of the Carriage of Goods by Sea Act, 46 U.S.C. §1304(2). It held that the "burden of proof is upon the carrier to show *both* that it was free from negligence and that the damage to the cargo was due to one of the excepted causes relieving the carrier of liability." *Id.* at 138 (emphasis added). *Schnell* v. *The Vallescura*, 293 U.S. 296, 304, is cited as authority in that decision. *Id.* at 144. In the case at bar the district court did not make defendants carry this burden. Even the Court of Appeals stated in its opinion:

> Aunt Mid has urged that the defendant could not rest with the affirmative defenses. They assertedly also bore the burden of proving their freedom from negligence. *The defendants have maintained that their showing that the damage resulted from an excepted cause eliminated the need for them to prove their freedom from negligence.* In any event, the district court did consider the question of the carriers' negligence and the vessels' alleged unseaworthiness. It concluded

that the cabbages were properly and unnegligently stowed and that the vessels were seaworthy. (Op. at 5) (App. 5-6) (Emphasis added).

The findings of fact and conclusions of law drafted by defendants' counsel and entered verbatim by the court stated that defendants' vessels were seaworthy and defendants had not been negligent, although defendants never attempted to carry their burden of proof to show that they were not negligent. Not only did defendants not carry their burden, but the findings and conclusions of law were directly contrary to the uncontradicted evidence as the following table shows:

A. Uncontradicted statements of the Chief Mate of the Sirefjell, who was still employed by defendants at the time he testified and who was in charge of the stowage of cargo on board the ship on the voyage in question, established negligence by his testimony against interest as follows:

(a) Cabbages booked ventilated were stowed in an unrefrigerated, airtight compartment which lacked essential forced air ventilation equipment. (R. App. 48, 175, 181, 183, 189, 191-2, 156) (Capt. Sognnes who did not board the vessel until docked in Chicago testified that he thought he felt fresh air but no knowledge or other basis for this assumption was shown.) (Tr. 586)	Found proper and not negligent.
(b) The perishable cabbages were stowed out of sight and inaccessible for inspection or viewing by any member of the crew in a closed hold. (R. App. 177, 188)	Found proper and not negligent.

(c) Although the cabbage was known to be having difficulty after 7 days at sea the Chief Mate made no attempt to view or to gain access to the cabbage during the remaining 20 days of the voyage. (R. App. 182, 175) Found proper and not negligent.

B. The Supercargo who loaded the M.V. Pra River and who was still employed by defendants at the time he gave evidence testified against his self-interest and the self-interest of his employer without contradiction establishing negligence on the part of the M.V. Pra River and other defendants.

(a) The Supercargo (crew member in charge of stowage) who stowed the vessel testified that he was ignorant of the characteristics and requirements of the cabbage cargo. (R. App. 222) Found proper and not negligent.

(b) Because the Supercargo was ignorant of the propensities and requirements of the cargo, he placed the cabbages in a closed hold fully loaded (R. App. 222) (on top of baler twine which creates heat). (R. App. 142.) Found proper and not negligent.

(c) Because of his said ignorance, he stowed part of the cabbages flush against the warm engine-room bulkhead. (R. App. 222-3, 149) Found proper and not negligent.

(d) The cabbages were stacked on top of and flush against plywood sides, cutting off air circulation from much of the cargo. (R. App. 222-3, 128-9, 149-60) Found proper and not negligent.

(e) The Supercargo stowed the edible and perishable cabbages as general cargo, which by his definition, excludes edibles. (R. App. 219, 220)

Found proper and not negligent.

(f) The Supercargo in stowing cabbages which were booked for ventilated space never attempted to inspect the ventilation in the hold into which he ordered the cabbages placed. (Pl. Ex. 6, R. App. 221)

Found proper and not negligent

(g) The Supercargo stowed these perishable cabbages not according to their nature and requirements but solely for the convenience of the vessel and only on account of destination. (R. App. 221)

Found proper and not negligent.

C. The documents without contradiction establish that the cabbages on the Pra River were booked for a 21-day voyage but the voyage took 24-days and the cabbages on board the Sirefjell were likewise booked for a 21-day voyage and the ship took 26 days to reach Chicago.

Found proper and not negligent.

The district court, in entering findings and conclusions favorable to defendants on the issues of negligence and seaworthiness when the manifest weight of the evidence clearly and uncontradictedly establishes negligence on the part of the carriers, was clearly wrong. In order to require uniform acceptance of the decisions of this Court (*Schell* v. *The Vallescura*, 293 U.S. 296; *Missouri & Pacific R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134), and to correct the confusion in the law now created by the decision of

the Court of Appeals for the Seventh Circuit in the case at bar, and for due process and equal operation of the law, we respectfully request the supervision and correcting authority of this Court by issuing the Writ of Certiorari, and that the decision of the Court of Appeals and District Court be reversed and liability placed upon defendants for the damages.

CONCLUSION

In view of the foregoing, we respectfully submit that the Court of Appeals opinion below is in conflict with the rulings of this Court and other circuit courts of appeals on important questions of federal law and practice; that the effect of the decision is to cause confusion and uncertainty in the law with resulting loss of substantial justice to citizens of the United States and will increase rather than decrease litigation in United States courts of review, unless the supervision and correcting authority of this Court is brought into use by granting the writ of certiorari.

Petitioners pray that the writ of certiorari to the Court of Appeals of the United States for the Seventh Circuit be allowed in this case, and that, on such review by this Court, the judgment of the United States Court of Appeals for the Seventh Circuit be reversed in its entirety or reversed and remanded with appropriate directions.

Respectfully submitted,

ZEAMORE A. ADER,
Attorney for Petitioners.

DAVID LINCOLN ADER,
Of Counsel

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1971 SEPTEMBER SESSION, 1971

No. 18891

AUNT MID, INC.,

Plaintiff-Appellant,

vs.

FJELL-ORANJE LINES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 68 C 1796 & 68 C 1797
RICHARD B. AUSTIN, *Judge.*

FEBRUARY 8, 1972

Before KNOCH, *Senior Circuit Judge,* and KERNER and PELL, *Circuit Judges.*[1]

PELL, *Circuit Judge.* Although the sea was clearly less than boiling hot, the defendants' ships equally clearly delivered cabbages far less than fit for kings.[2] Therefrom arose this lawsuit.

[1] Judge Kerner heard oral argument, but did not participate in the adoption of this opinion.

[2] With appropriate respect to the memorable dissertation anent many things by Lewis Carroll's vocal walrus.

Plaintiff Aunt Mid, Inc. appeals from the judgment of the district court holding the defendants not liable for the spoilage of two cargoes of Danish cabbage carried from Rotterdam, The Netherlands, to Chicago, Illinois, aboard ships charted by the defendants, the Ghanaian *Motor Vessel Pra River* and the Norwegian *Motor Vessel Sirefjell.* Plaintiff sought recovery of $10,500 for the damage to the cabbages on the *Pra River,* and $6,000 for the cabbages on the *Sirefjell.*

The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§1300-1315, governs these consolidated actions. Aunt Mid contends that it delivered the cabbage to the vessels in good condition and that as a result of the defendants' negligent stowage and carriage the cabbages were rotten upon arrival in Chicago. It further claims that the *Pra River* and the *Sirefjell* were unseaworthy.

Aunt Mid, Inc. makes cole slaw and tossed salads for retail sale. In 1966, the president of Aunt Mid, Russell LaMantia, entered into a joint venture on behalf of his company with Suffolk Farms Packing Company of Massachusetts to purchase Danish cabbage from Holland. Arnold Wolf of Suffolk Farms represented the joint venture in the purchase and inspection of the cabbage in Holland.

The two firms jointly purchased 500 tons of cabbage in Holland in late October or early November 1966. All 500 tons came from two sources: a cabbage dealer from whom 350 tons were purchased and a farmer from whom 150 tons were purchased. Aunt Mid's share of the joint purchase was 100 tons. The testimony was vague as to whether Aunt Mid's cabbages came from both the farmer and the dealer. Plaintiff asserts that the cabbages from the two sources were intermixed in shipment. This, no

doubt, is true as to the total 500 ton shipment which was spread through approximateley sixteen ships; however, it is far from clear that the specific cabbages involved in this case, which were carried on two ships only, came from both sources. Further, as to the 350 tons from the dealer, there is a paucity of evidence on such significant matters as to how many farmers may have produced these cabbages and as to the care they may have received prior to their being loaded aboard the vessels.

Wolf first inspected the 150 tons of cabbage in the farmer's holding house in the latter part of November or early December 1966. The farmer had grown all his own cabbages and had stowed them in the holding house, wherein they were the only cabbages. Wolf testified that he found the farmer's cabbage to be good, solid cabbage and properly handled. Accompanied by LaMantia, he revisited the holding house in February 1967. The cabbages were again found to be good and professionally handled. The cabbages purchased from the produce dealer were never personally observed by either Wolf or LaMantia prior to shipment. As indicated hereinabove, there was no evidence as to how they were stored and cared for after harvesting or what their pre-voyage condition was.

We find no reason for qualifying this observation because of Aunt Mid's assertion that there was such evidence in the form of certain governmental certificates and bills of lading. We discuss the probative value of these items hereinafter.

The cabbages bound for Aunt Mid's in Chicago were packed in 50 pound mesh bags a few days prior to being shipped and were carried to the port in closed trucks, where they were placed on four vessels, the voyages of

only two of which are the subject of this action.[3] LaMantia requested that all the cabbages be shipped in ventilated stowage. The bills of lading issued by the vessels recited that the goods were to go "Hold Stowage."

The *Pra River* cabbages were stowed on board on April 15, 1967, as ordinary or general cargo, not as perishable cargo. The trip from Rotterdam to Chicago took 24 days, and the ship encountered temperatures ranging from approximately 32° to 52°F., the latter while on the Gulf Stream. On arrival at Chicago, the cabbages were decayed, gave off a strong rotting odor and were discolored black. A surveyor from the Department of Agriculture found that the cabbages suffered from bacterial soft rot. Before leaving Holland, the cabbages had received certification from the Phytosanitary Service (Plant Protection Service) of The Netherlands and the Export Control Bureau. Also, the vessel had issued a bill of lading stating that the cabbages were in "apparent good order and condition."

The cabbages to be shipped on the *M. V. Sirefjell* were taken on board on April 22, 1967, and were placed in a reefer compartment (but without the refrigeration turned on) as general cargo. Seven days at sea, the Chief Mate smelled the cabbages and ordered the refrigeration to be activated. The trip to Chicago took 26 days, during which time the ship encountered temperatures again ranging from 32° to about 52°. The cabbages on arrival were discolored black, were wet and running in part and had a rotting odor. The Department of Agriculture inspector found that the cabbages suffered from both bacterial soft

[3] Of the shipments bound for Aunt Mid, Inc. at Chicago, the first contained 900 bags, the second, on the *M.V. Pra River*, contained 1800 bags, the third, on the *M. V. Sirefjell*, contained 900 bags, and the fourth contained 900 bags.

rot and watery soft rot.[4] As in the case of the *Pre River* cabbages, the *Sirefjell* cabbages had received certificates from two Dutch agencies and a "clean" bill of lading from the vessel.

The rot in both shipments was general throughout. Because the cabbages were deemed unfit for consumption, the United States Bureau of Customs destroyed them.

The defendants contend that under the applicable law, a shipper, as a condition precedent to recovery, must establish the good order and condition of the goods shipped. He must prove, in the case of perishables such as cabbages, that the goods will survive the voyage booked. The district court below found that Aunt Mid failed to carry this initial burden.

The defendants also pleaded two affirmative defenses, either of which, they claim, would absolve them from liability: (1) that the damage resulted from an "act or omission" of the shipper (46 U.S.C. §1304(2)(i)) and (2) that the damage resulted from an "inherent vice" of the goods (46 U.S.C. §1304(2)(m)). The "act or omission" was the decision of Aunt Mid's president to ship the cabbages in hold stowage rather than under refrigeration to save freight costs. The "inherent vice" alleged was the presence of various bacteria, spores and fungi—which were invisible to the human eye—on the cabbages at the time of loading. These bacteria allegedly multiplied and caused the cabbage to decay. The district court held that the defendants had proved both the affirmative defenses.

Aunt Mid has urged that the defendants could not rest with the affirmative defenses. They assertedly also bore

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[4] One the defendants' expert witnesses stated that, on the basis of black and white photographs of the cabbages that he was shown, the cabbages also suffered from the disease of alternaria.

the burden of proving their freedom from negligence. The defendants have maintained that their showing that the damage resulted from an excepted cause eliminated the need for them to prove their freedom from negligence. In any event, the district court did consider the question of the carriers' negligence and the vessels' alleged unseaworthiness. It concluded that the cabbages were properly and unnegligently stowed and that the vessels were seaworthy.

Preliminarily, we note that this court is bound by the "clearly erroneous" test of Fed.R.Civ.P. 52(a). Our decision here reflects use of that test. Rules 1, 81(a), Fed. R.Civ.P. *See also McAllister* v. *United States*, 348 U.S. 19, 20 (1954), *modif. denied*, 348 U.S. 957 (1955).

We cannot agree with the plaintiff's argument, advanced in its reply brief, that the "clearly erroneous" rule is inapplicable to this case because there was little conflicting testimony and, therefore, there would be no need to rely on the trial judge's ability to view the witnesses and to make the ordinary determinations based on credibility factors.

We need not address ourselves to the somewhat divergent views on the scope of appellate review where the findings are based solely on documentary evidence or undisputed facts (see 2B W. Barron and A. Holtzoff, *Federal Practice and Procedure* §§1132, 1134 (Wright ed. 1961 and Supp. 1970)). Here there was conflicting oral testimony, and the district court obviously did not find all witnesses equally credible. We reject the plaintiff's suggestion, the effect of which would be for this court to try the case de novo.

We also are constrained to remark upon the manner in which Aunt Mid challenged the district court's findings

of fact. It did not help to clarify the issues for us in a close and complex case. The plaintiff discussed specific findings only in its reply brief, thus allowing the defendants no opportunity via brief to answer those challenges point by point. Such a deferring procedure increases the difficulty of an appellate court's reviewing task.

The parties agree that bacteria "caused" the cabbages to rot. Their experts seem to agree that certain conditions must be present for the bacteria to multiply to such an extent that they endanger the wholesomeness of the vegetables. However, the parties disagree as to who is to bear the fault for the cabbages' deterioration. By their affirmative defense based on 46 U.S.C. §1304(2)(i), the defendants are basically maintaining that the growth of the bacteria resulted from Aunt Mid's failure to ship the goods under refrigeration. The plaintiff insists that the defendants' negligence brought about the "immediate cause"—that is, the disastrous multiplication of destructive bacteria—or, at least, contributed to its occurring.

With regard to the defendant's affirmative defense of act or omission of the shipper,[5] the defendants reply primarily on an exchange of letters between Arnold Wolf of Suffolk Farms and Russel LaMantia of Aunt Mid. The following language in a March 27, 1967, message from Wolf and LaMantia is crucial for the defense:

> "Wolf & Wolf [the Dutch firm with which Wolf was also associated] is of the opinion that cabbage to the Great Lakes with a voyage of three weeks should be shipped under refrigeration.
>
> . . .

[5] As we mentioned above, the defendants also pleaded the affirmative defense of "inherent vice," 46 U.S.C. §1304(2)(m). To decide the case before us, we find it unnecessary to reach that issue.

> "[Y]ou should bear in mind that there is a certain risk involved, while under refrigeration you will practically have no risk. The decision and responsibility is of course entirely yours."

The district court considered this language to be of substantial significance as reflected in the following part of the fourth conclusion of law:

> "[T]he evidence shows that the plaintiff compared the freight rates applicable to ventilated hold and refrigerated stowage; then, against the advice of its agent, Mr. Wolf, and contrary to the usual and customary industry practice, it elected to take the risk of shipping the goods in ventilated hold stowage in order to save $1,560.00 in freight rates. The plaintiff represented to the vessel's [sic] agent that the goods would carry in ventilated space for a period of twenty-one days; that they would not was evident from the condition of the goods at discharge. Had the plaintiff elected to ship the goods under refrigeration at approximately, but not lower than, 32 degrees, the loss would not have occurred. . . .
>
> "The plaintiff gambled when he shipped the cabbages in a ventilated hold rather than under refrigeration. This act, together with the tendency of the goods to spoil at temperatures in excess of 40 degrees, caused the loss. . . ."

The plaintiff calls to our attention another sentence in the March 27th letter: "Salvi is *inclined* to agree with you to ship it in ventilated space." [Emphasis supplied.] According to LaMantia, "Salvia" referred to Salvi Detouche, who performed the same function for Suffolk Farms that LaMantia performed for Aunt Mid, that is, buying and selling fresh vegetables and supervising the packaging of them. LaMantia further stated that he highly valued Detouche's opinion.

Wolf was called as a witness by the plaintiff. It was Aunt Mid who stressed Wolf's qualifications: he was a veteran importer-exporter of vegetables, and he knew a great deal about cabbages. The district court had the opportunity to observe Wolf's demeanor and to evaluate his credibility. We will respect the court's reliance on Wolf's expert opinion.

In a further attempt to minimize the effect of Wolf's opinion expressed in the March 27th letter, Aunt Mid refers to testimony by Wolf that, until the advent of containerization, he usually shipped goods from Holland to the United States in ventilated stowage. The plaintiff also points out that Wolf recalled instances where cabbages had been successfully carried to the United States by ship in ventilated stowage as late as July of the year following harvest.

On cross-examination, the defendants elicited from Wolf that his above remarks had reference to voyages from Holland to the east coast (New York, Boston) of the United States, voyages which take approximately nine days. In light of his findings, we infer that the trial judge decided that the difference in time between trips from Holland to the east coast and from Holland to Chicago greatly limited the applicability of Wolf's remarks. We find no clear error in the court's apparent conclusion that Wolf's testimony did not prove that the use of ventilated stowage was customary and usual for voyages from Holland to Chicago.

The defendants put in evidence a handbook written by their witness, Dr. Ramsey, a pathologist. That book states that "[s]hipments to distant markets should be refrigerated at 40 to 45 degrees Fahrenheit during transit." In its findings of fact, the district court found

that refrigeration to at least 40 to 45 degrees was the usual and customary industry practice for shipments to distant markets. As previously noted, in its fourth conclusion of law, the court stated, "had the plaintiff elected to ship the goods under refrigeration at approximately, but not lower than, 32 degrees, the loss would not have occurred."

Aunt Mid contends that the district court's conclusion is inconsistent with its findings and with the expert testimony at trial. We cannot deny that there was some confusion and confliction as to exactly what was a safe temperature and at what thermal points the spoiling propensities of cabbages would be almost completely controlled merely retarded or vigorously accelerated.

The conflicts illustrate the necessity for resolution thereof on a credibility basis by the district court. Further, we do not find the inconsistencies more than apparent inasmuch as there was supporting evidence that the diseases would not be unduly deleterious at the 40 to 45 degree range.

While primary attention seems to have been directed during the trial to temperatures at various times and places, there was also testimony indicating that high humidity would provide the setting for the rapid growth of the destructive organisms. Exactly what the relative humidity was at the time of the shipments here involved is not clear in the record.

Other argumentative contentions are advanced by Aunt Mid of similar ilk to these previously mentioned, all of which are directed at the conflicting testimony, with the apparent underlying premise that the opinions advanced by plaintiff's witnesses are inherently more believable. If, arguendo, and as a matter of first impression, this

were so, we are not on appellate review "left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). No purpose is served, other than unduly lengthening this opinion, by a further detailed analysis of each claimed factor affecting or not affecting the ocean voyage of these particular cabbages. Sufficient has been set forth herein to demonstrate the necessitous and determinative applicability of the clearly erroneous rule.

Even if, as Aunt Mid urges, the district court's findings are not completely internally consistent and do contain a few inaccurate summaries of the testimony, we conclude that they sufficiently inform us of the evidentiary bases for the district court's decision. Hence, in light of the evidence discussed above, we are unpersuaded that the district court erred in determining that the plaintiff gambled in using ventilated stowage rather than refrigeration and that it should bear the loss resulting from the election.

As the court stated in *Commodity Service Corp.* v. *Boston Ins. Co.*, 1964 A.M.C. 926, 939 (S.D.N.Y. 1964), *aff'd sub nom. Commodity Service Corp.* v. *Hamburg-American Line*, 354 F.2d 234 (2d Cir. 1965), "The temperatures to which the fatbacks were exposed while on the carrier's pier and in the course of ocean transit must be deemed the risk of the shipper since the plaintiff elected not to contract for specially cooled treatment either at the pier or in transit."

What we have said with regard to the issue of "act or omission' is equally applicable to the other principal issues raised by Aunt Mid, *i.e.*, whether the defendants were negligent, which negligence was an efficient cause of the deterioration, and whether the vessels in question were unseaworthy.

Piercing through the weltering contentions—that there was inadequate ventilating equipment, that cabbages were stowed so as not to be readily accessible for inspection, that outside fresh air could not be introduced but only stale air was recirculated, that one hold was excessively warm because near the engine room, that proper steps were not taken to investigate the deterioration, that some cabbages were stowed on top of heat-generating merchandise, and variations of the foregoing—we eventually find ourselves with the conviction that irrespective of how we might have decided the issues on the conflicting testimony relating thereto, we are unable to say that the findings of fact are clearly erroneous or that the conclusions of law based thereon require a reversal.

Upon analysis it appears that plaintiff Aunt Mid was really seeking a trial de novo on this appeal. However, "[t]his Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. . . . In determining whether there is a sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inferences deducible therefrom which is most favorable to the . . . [party prevailing below]." *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416, 417-18 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944). *Accord*: *Shapiro* v. *Rugens*, 166 F.2d 659, 665, 666 (7th Cir. 1948).

The position which we have reached on the issues hereinbefore discussed is well stated in the language of Judge Hastings in *Prince* v. *Parker Mfg. Co.*, 419 F.2d 34, 38 (7th Cir. 1969), as follows:

> "In sum, since it is left to the trial court to weigh the evidence, resolve any conflicts, draw inferences, determine the credibility of witnesses and declare the result, we hold there is substantial evidence in the

record as a whole to support the challenged findings. Further, not having a firm and definite conviction that a mistake has been committed, we hold that the findings of fact and conclusions of law based thereon are not clearly erroneous."

Aunt Mid also claims reversible error arising from certain of the district court's rulings excluding proffered evidence. In directing our attention to these matters we do so in the light of the fact that this was a bench trial. The exclusion of evidence which should properly have been admitted is much more susceptible to having a disastrous effect upon the litigant's cause where a jury is involved as contrasted to the bench trial, where the finder of fact has heard the evidence in dispute in the form of a proffer and may well have decided that no weight whatsoever would be accorded to it even if technically admitted. *Cf. United States* v. *Compania Cubana de Aviacion, S.A.*, 224 F.2d 811, 822 (5th Cir. 1955).

The first ruling challenged pertains to the phytosanitary certificates issued by the Plant Protection Service of The Netherlands, an official department of the Dutch Government. Their authenticity and genuineness were not questioned, but the court permitted them in evidence only for the fact that they had been issued. The court would not admit them for the truth of their statements, which were to the effect that the cabbages were "thoroughly examined . . . and were found . . . to be substantially free of injurious diseases and pests." Aunt Mid relies on 28 U.S.C. §§1732(a) and 1741.

While the admission of this evidence would seem to be directed in part at least to the inherent vice issue which we have not deemed necessary to consider, we are of the opinion that the district court's ruling was correct in any event.

This was not a situation where a certificate recorded a purely factual matter, such as the number of bags of cabbage, whether there were any objective visual evidences of bruising or other damage to the cabbages, or even that the shipment was in apparent good condition. Here the "truth" which Aunt Mid wanted in evidence was an opinion that the cabbages were free of injurious diseases. In view of the testimony of the nature of the particular diseases attacking the cabbages, it appears clear that something more than a mere routine visual examination or inspection would have been required to support the opinion. The district court correctly pointed out that the piece of paper could not be cross-examined, and the inspector could not be.

As this court stated in *United States* v. *Bohle*, 445 F.2d 54, 65 (7th Cir. 1971), ". . . the party to be confronted by such an opinion should have the full opportunity of cross-examination. We must also keep in mind that cross-examination deals not only with the basis and content of an opinion but with the professional qualification of the person rendering the opinion."

The distinctions that this court made in *Bohle, supra,* are applicable here.

We have no particular doubt on the evidence in this case that the cabbages were in apparent good condition,[6] or at least were substantially so, at the time of embarkation; but that is not, in view of the particular disease or diseases here involved, the crucial question.

---

[6] Indeed, during the course of the trial when ruling upon an objection to a hypothetical question, the district court observed, "[n]obody ever tested it to see how good the condition was. Nobody could see, based on what witnesses have been here, what the condition was except *apparently* it was in good condition." [Emphasis supplied.]

Aunt Mid's next contention of error on evidentiary rulings was the striking from the testimony of evidence concerning the fact that several other shiploads of cabbages from the same sources, bagged the same way, shipped in ventilated stowage from Rotterdam to the United States in the same period of time and held for the same length of time were found to be in excellent condition.

At the outset it must be noted that 12 of the shipments went only to the east coast of the United States and not to Chicago via the St. Lawrence and Great Lakes. The east coast voyage was considerably shorter, and we have no difficulty in affirming the district court's exclusion of this particular evidence. The evidence here with regard to the other two ships going to Chicago presents a closer question. However, upon analysis, despite continued efforts on the part of the plaintiff during the trial to show similarity of conditions and circumstances, we do not find that those efforts were crowned with sufficient success to make this evidence necessarily admissible. It appears clear from an overall view of the evidence and the findings of fact that the district court would have given no weight to this particular evidence which was proffered.

Looking at the evidence we are unable to state why cabbages on two ships arrived in Chicago in satisfactory condition and cabbages on two other ships did not. Likewise, we are unable to state why one bowl of fruit on a dining room table will appear to be blessed with relative immunity to natural decay when the following week a bowl of similar fruit in the same dining room will succumb rapidly to the ravages of time or disease. We are primarily concerned here with the two ships which delivered the damaged cargo. The district court having found that the cabbages were not negligently stowed, that the vessels were not unseaworthy and that the difficulty arose from

an act or omission of the plaintiff, all of which we have found not to be clearly erroneous, we cannot say that the exclusion of the particular evidence was prejudicial to the plaintiff.

As we have already noted, it was not clear that the two shiploads in question necessarily came from the same source as the other shipments to the United States. This is an initial stumbling block which plaintiff did not surmount in attempting to show sufficient similarity of conditions or circumstances so as to make the evidence admissible.

Looking at the matter from another point of view, if the evidence had been admitted without more proof of similarity of conditions and circumstances than was here brought forth and the eventual judgment had been for the plaintiff, the defendant would have been in a position justifiably to have attacked the judgment founded in part on such evidence.

Finally, and in any event, this evidence is offered solely on the issue of the inherent vice, which issue we have not found it necessary to reach in deciding this case.

Aunt Mid next contends that the court committed reversible error in not permitting its refuttal witness, plant pathologist Malcolm C. Shurtleff, to answer the following question:

> "In your opinion, as an expert, Doctor, as a practical matter, would it be reasonably safe to ship cabbages from mid-April to mid-May from Holland, across the Atlantic, down the St. Lawrence to the Port of Chicago in well-ventilated stowage when the temperatures on the Atlantic ranged between 32 degrees and 54 degrees?"

The offer of proof indicated that the witness would have answered "Under well-ventilated stowage, yes."

Plaintiff complains, probably justifiably, that the district court sustained a general objection which specified no grounds and, when asked as to the grounds of the sustaining of the motion, the court merely replied that "the record discloses the grounds."

Notwithstanding that the matter now under consideration occurred near the close of a five day bench trial, which the court rather obviously was trying to bring to a terminal status and during which all of the matters encompassed in the particular question and the expected answer had been thoroughly ventilated for the court, nevertheless, in the particular situation here involved it would seem it might have been better practice for the court to have satisfied counsel's request and to have stated the grounds on which the objection was sustained.

Aunt Mid refers to the question as being a hypothetical question and contends that if the objection had been sustained on the ground that some elements had been left out of the question, a specification of the ground for the ruling would have enabled counsel to have corrected the question. While the question does not strike us, in form, as a typical hypothetical question, nevertheless, there is some validity in the contention and without the record showing the basis for the sustaining of the objection, it is necessary for us to look at the record to which the court referred to see if there was any prejuidice to plaintiff by the exclusion. We are of the opinion that there was none.

The question is a close one and was not made any less so by the fact that an expert pathologist called by the defendants had been permitted to testify over an objection that he had an opinion that the ordinary prudent shipper

of cabbages would be taking a big gamble to ship cabbag which had been in ventilated storage in Holland for period of approximately 4 and ½ months on an ocea voyage expected to take approximately 21 days in unr frigerated stowage. Indeed, the district court placed r liance on this particular testimony in the conclusions law.

However, it becomes so obvious as to be beyond arg ment that even if there had been a technical admissio of the proffered answer to the question the district cou would have been of the opinion that the prudent shippe would not have taken the gamble. There was evidenc already before the court during the five days of trial tha some shipperes thought it was safe to ship cabbages i non-refrigerated stowage and some did not. The distric court was aware of the difference of opinions held b the experts, and we cannot say the court was wrong i finding the elements of a gamble in this very difference

Further, the particular proposed answer would merel have had a cumulative summary effect, as Dr. Shurtlef had already testified in detail about the impact of variou conditions and their influence upon the development o the disease, the clear import of which was that prope ventilation on the ship would have substantially prevented the condition's developing. The proposed question and an swer really added nothing more.

Finally, after extended colloquy on additional hypothet ical questions, the court suggested that defendants dis continue objections, let the witness answer, and then the defendants could deal with him on cross-examination. Dr. Shurtleff was then permitted to testify in response to a hypothetical question that he thought the ventilation on the defendants' ships was inadequate. This was the crucial

part of his testimony, and we cannot find that the technical exclusion of the summation answer to the opinion question was such as to constitute reversible error.

In sum, it was fully before the district court that there were differences of opinion as to the practical safety of shipping cabbages as they were here shipped, and we are not convinced that there would have been any change in the finding of fact by the mere act of admitting the somewhat vague opinion, which we do not deem as having any additional probative value.

We have considered other claimed errors and do not find cause for reversal.

For the reasons hereinbefore set out, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. Joint Abbreviated Appendix filed April 19, 1971.

Cause No. 18891

AUNT MID, INC.,

Plaintiff-Appellant,

vs.

FJELL-ORANJE LINES, et al.,

Defendants-Appellees.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of July A.D. 1972.

William H. Pittman
William H. Pittman
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ..... pages contain a true copy of

1. Opinion filed February 8, 1972.

2. Judgment entered February 8, 1972.

3. Appellant's Petition For Rehearing filed March 13, 1971.

4. Order entered April 19, 1972 denying Petition For Rehearing.

Cause No. 18891

AUNT MID, INC.,

Plaintiff-Appellant,

vs.

FJELL-ORANJE LINES, et al.,

Defendants-Appellees.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of July A.D. 1972.

William H. Pittman
William H. Pittman
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
Seventh Circuit

December 15, 1971

I have been informed that an indictment has been returned against Judge Kerner.

Judge Kerner promptly asked the court to relieve him of all participation in any activity of the court pending the final disposition of the indictment against him. The court has accepted his request and Judge Kerner will not participate in any court matter during the pendency of the case arising from the indictment.

Luther M. Swygert

I, Luther M. Swygert, Chief Judge of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the above memorandum, dated December 15, 1971, was publicly announced on said date.

Luther M. Swygert
Chief Judge, United States Court of Appeals for the Seventh Circuit

(Seal)

Title 28, United States Code, Judiciary and Judicial Procedure.

Vol. 7, p. 7431, Ch. 3—Courts of Appeals

§ 46. *Assignment of judges; divisions; hearings; quorum.*

(a) Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges. Such divisions shall sit at the times and places and hear the cases and controversies assigned as the court directs.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. (June 25, 1948, ch. 646, 62 Stat. 871; Nov. 13, 1963, Pub. L. 88-176, § 1(b), 77 Stat. 331.)

Vol. 7, p. 7562, Ch. 83—Courts of Appeals

§ 1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

Vol. 7, p. 7560, Ch. 81—Supreme Court

Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Vol. 7, p. 7636, Ch. 133—Review—Miscellaneous Provisions

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Vol. 7, p. 7568, Ch. 85—§1333, Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Title 28, United States Code, Appendix—Rules of Appellate Procedure.

Vol. 7, p. 7702, Rule—Appeal as of Right—When Taken

(a) *Appeals in Civil Cases.*

In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the

judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Title 28, Appendix—Federal Rules of Civil Procedure.

Vol. 7, p. 7814—Rule 52.—Findings by the Court.

(a) *Effect.*

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law therein, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similiarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Title 46, United States Code, Shipping.

Vol. 7, p. 11619, § 1302. *Duties and rights of carrier.*

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stow-

age, carriage, custody, care, and discharge of suc
goods, shall be subject to the responsibilities and li
bilities and entitled to the rights and immunities s
forth in sections 1303 and 1304 of this title. (Apr. 1
1936, ch. 229, § 2, 49 Stat. 1208.)

Section Referred to in Other Sections

This section is referred to in section 1313 of th
title.

§ 1303. *Responsibilities and liabilities of carrier an*
ship.

(1) *Seaworthiness.*

The carrier shall be bound, before and at the begi
ning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling cham
bers, and all other parts of the ship in which goods ar
carried, fit and safe for their reception, carriage, an
preservation.

(2) *Cargo.*

The carrier shall properly and carefully load, han
dle, stow, carry, keep, care for, and discharge the good
carried.

(4) *Bill as prima facie evidence.*

Such a bill of lading shall be prima facie evidence o
the receipt by the carrier of the goods as therein de
scribed in accordance with paragraphs (3) (a), (b)
and (c), of this section: *Provided,* That nothing in thi
chapter shall be construed as repealing or limiting th
application of any part of sections 81 to 124 of Title 4

Vol. 7, p. 11620, §1304—Rights and immunities of carrier and ship.

(1) *Unseaworthiness.*

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) *Uncontrollable causes of loss.*

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or otherwise navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be in the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E COPY

Supreme Court, U. S.
FILED
AUG 17 1972
MICHAEL RODAK, JR., CLERK

No. 72-102

In the

Supreme Court of the United States

OCTOBER TERM, 1972

AUNT MID, INC.,

Petitioner,

vs.

FJELL-ORANJE LINES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION.

MICHAEL A. SNYDER,
DANIEL K. SCHLORF,
Attorneys for Respondents Oranje Lijn (Maatschappij Zee Transport) N.V.

JONATHAN A. BUNGE,
ROBERT A. CREAMER,
Attorneys for Respondents Fjell-Oranje Lines, et al.

Of Counsel:

BRADLEY, EATON, JACKMAN & MCGOVERN
135 South LaSalle Street
Chicago, Illinois 60603

PRICE, CUSHMAN, KECK & MAHIN
134 South LaSalle Street
Chicago, Illinois 60603

The Scheffer Press, Inc.—(312) 263-6850

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-102

AUNT MID, INC.,

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vs.

FJELL-ORANJE LINES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION.

ADDITIONAL STATUTE INVOLVED

In addition to the Subsections of 28 U.S.C. §46 quoted in petitioner's Petition, Subsections (c) and (d) of 28 U.S.C. §46 are relevant to the issues raised by the Petition. These provide:

> (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regu-

lar active service. A court en banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has returned from regular active service shall also be competent to sit as a judge of the court en banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof.

(d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum.

COUNTER QUESTIONS PRESENTED

1. Has 28 U.S.C. §46 (d), which provides that a majority of the number of judges authorized to constitute a division shall constitute a quorum, been construed and utilized to deprive petitioner of equal protection of the law?

2. Does the "clearly erroneous" standard apply to the Findings of Fact entered by the District Court?

3. Were the Findings of Fact entered by the District Court clearly erroneous?

4. Whether previous decisions by the Supreme Court warrant or compel a result other than that reached by the District Court and Court of Appeals for the Seventh Circuit?

COUNTER STATEMENT OF THE CASE

These actions were brought by the petitioner, AUNT MID, INC., against the charterers and other interests connected with two ships, the Ghanian Motor Vessel PRA RIVER and the Norwegian Motor Vessel SIREFJELL, for alleged damages to two cargos of cabbages shipped aboard these vessels. Recovery was sought against the PRA RIVER in the amount of $10,500. Recovery of $6,000

was sought from the SIREFJELL. Forty tons of cabbages were shipped aboard the PRA RIVER; these had been purchased by AUNT MID at the rate of $50 per ton or at a total price of $2,000.00. Twenty tons of cabbages were shipped on the SIREFJELL; these had been purchased by Aunt Mid at a cost of $50 per ton or a total of $1,000.00.

After five full days at trial in the District Court, Judge Austin entered extensive Findings of Fact and Conclusions of Law. These accurately summarize the proceedings in the District Court and are therefore incorporated by respondents as part of their Counter Statement of the Case.*

The thrust of the evidence in the District Court was concisely summarized by the Court in Conclusion of Law 4:

> "The evidence shows that the plaintiff compared the freight rates applicable to ventilated hold and refrigerated stowage; then, against the advise of its agent, Mr. Wolf, and contrary to the usual and customary industry practice, it elected to take the risk of shipping the goods in ventilated hold stowage in order to save $1,560.00 in freight rates. The plaintiff represented to the vessel's agent that the goods would carry in ventilated space for a period of twenty-one days; that they would not was evident from the condition of the goods at discharge. Had the plaintiff elected to ship the goods under refrigeration at approximately but not lower than 32°, the loss would not have occurred. Dr. Ramsey characterized the act of shipping the cabbages without refrigeration as a

---

*Even though Aunt Mid contends the United States Court of Appeals erred in its affirmance of these findings and conclusions, such findings and conclusions are not set forth in petitioner's appendix; respondents have therefore set out the Findings of Fact and Conclusions of Law in their appendix.

'gamble' and stated that he would not expect them to hold up.

"The plaintiff gambled when he shipped the cabbages in a ventilated hold rather than under refrigeration. This act, together with the tendency of the goods to spoil at temperatures in excess of 40°, caused the loss."

On Aunt Mid's appeal to the United States Court of Appeals for the Seventh Circuit, the division of the Court assigned to hear the appeal consisted of three judges of that Court, Judges Knoch, Pell and Kerner. After oral argument, Judge Kerner was relieved of his duties. Judges Knoch and Pell unanimously voted to affirm the decision of the District Court.

ARGUMENT

I.

PETITIONER SHOULD NOT BE GRANTED A WRIT OF CERTIORARI ON THE GROUND THAT ONE OF THE THREE JUDGES HEARING ORAL ARGUMENT RESIGNED PRIOR TO THE COURT'S DECISION BEING MADE.

Aunt Mid contends the panel of Judges Knoch, Pell and Kerner was illegally constituted, because after oral arguments were heard, Judge Kerner withdrew from active service and did not participate in the adoption of the Court's opinion. Aunt Mid cites *Allen* v. *Johnson,* 391 F.2d 527, 531 (5th Cir. 1968) as authority for this proposition.

The only question presented to the Court in the *Allen* case was whether a Senior Circuit Judge who sat on a three judge panel in the original hearing of the case, in which no decision was rendered or opinion announced prior to the Court's order setting the case down for rehearing *en banc,* is eligible to participate in the *en banc* determination of that case.

The *Allen* decision did not purport to hold that the continued participation of three judges is necessary to determine a case on appeal.

On October 8, 1971, oral arguments were heard before Judges Knoch, Kerner and Pell who were each then in regular active service on the Court. This constituted the Court. *Bradley Mining Co.* v. *Boice,* 205 F.2d 937 (9th Cir. 1953).

In *Ayrshire Collieries Corporation* v. *United States*, 331 U.S. 132, 138, 67 S.Ct. 1168, 1171 (1947) the Supreme Court compared the three-judge court requirement of the Urgent Deficiencies Act with the provisions of 28 U.S.C. §212 (presently 28 U.S.C. §46). The Court stated:

> "It is significant that this Act makes no provision for a quorum of less than three judges. *Two judges of a three-judge circuit court of appeals, on the other hand, ordinarily constitute a statutory quorum for the hearing and determination of cases . . .*" (Emphasis supplied)

In *United States* v. *Allied Stevedoring Corp.*, 241 F.2d 925 (2nd Cir. 1957) an appeal from a conviction for attempted income tax evasion was determined by Judges Hand and Clark after Judge Frank had died. Judge Learned Hand stated:

> "Section 46(d) of Title 28 U.S.C. provides that 'A majority of the number of judges authorized to constitute a court or division * * * shall constitute a quorum:' *and even when a judge has resigned after argument*, or has died after expressing his dissent, *a remaining majority has jurisdiction to dispose of the appeal . . .*" (Emphasis supplied)

In *United States* v. *Mills*, 317 F.2d 764, 766 (4th Cir. 1963) appellees were not entitled to a rehearing where the appeal was determined by two judges, the third having neither heard oral argument nor participated in subsequent conferences, and having died before the decision was entered.

Aunt Mid further contends that it was prejudiced in that it had to convince all of the judges deciding the case rather than two-thirds of them. Appellees were in the

same position, and therefore, had no prejudicial advantage over the appellant. Further, even had Judge Kerner participated in the decision and supported Aunt Mid's position, the case still would have been affirmed by the majority.

II.

THE FINDINGS OF FACT OF THE DISTRICT COURT ARE TO BE SET ASIDE ONLY IF THEY ARE CLEARLY ERRONEOUS.

Aunt Mid's argument, both in the Court of Appeals and here, is basically that the factual questions in this case were improperly decided in the District Court. However, it recognizes that the review of the Court of Appeals and of this Court is limited in connection with such questions by the clearly erroneous rule. That well-established rule, as stated in *United States* v. *United States Gypsum Co.*, 33 U.S. 364 (1948), is that findings are not to be reversed unless the reviewing court is left with the definite and firm conviction that a mistake has been committed. That standard is applicable to any trial to a Court sitting without a jury, including cases in admiralty. *McAllister* v. *United States*, 348 U.S. 19 (1954).

In its third and fourth arguments, Aunt Mid contends that the findings of the District Court in this case are not entitled to the protection of the clearly erroneous standard. Aunt Mid contends that not only does the clearly erroneous rule not apply to the findings below, but they should be set aside as a "nullity" because the findings were similar to proposed findings drafted by counsel for respondents.

In evaluating Aunt Mid's argument, a review of the pertinent facts is of assistance. At the close of five days of trial, immediately following final argument, Judge Austin summarized his views of the evidence at length, describing the decision of the plaintiff to ship its cabbages in unrefrigerated storage as a "gamble", and announced his intention to rule for the defendants. He then directed counsel for the defendants to draft proposed Findings of Fact and Conclusions of Law. They did so. Subsequently, Judge Austin stated in open court that he had reviewed the Proposed Findings of Fact and Conclusions of Law, that they conformed to his recollection of the evidence and that he was therefore entering them as his findings.

There was no abrogation or delegation by the Court of its fact finding function. To the contrary, the only role defendants' counsel played in the process was purely mechanical in setting forth the evidence and legal authorities in the Proposed Findings of Fact and Conclusions of Law to conform to the previously expressed intentions of the Court.

Aunt Mid also contends that, because most of the evidence was in the form of depositions and exhibits, the clearly erroneous rule does not apply. Aunt Mid's argument fails in two respects. First, most of the significant testimony—and conflicting testimony—was from live witnesses, *i.e.*, Messrs. La Mantia, Wolf, Crijnen, Nusbach, Wilkinson, Captain Sognnes, Captain Dodd, Doctor Ramsey, Doctor Schurtleff; in all, nine of a total of twelve witnesses testified in person. The Court of Appeals stated (App. 6):

> "Here there was conflicting oral testimony, and the District Court obviously did not find all witnesses equally credible. We reject the plaintiff's suggestion,

the effect of which would be for this Court to try the case de novo."

Further, the law since *United States Gypsum* and *McAllister* is well-established that the clearly erroneous rule applies even where the evidence consists largely of deposition testimony and exhibits. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278 (1960); *United States Steel Corporation* v. *Fuhrman*, 407 F.2d 1143 (6th Cir., 1969).

Finally, Aunt Mid argues that the clearly erroneous rule does not apply to mixed questions of law and fact. The case from which Aunt Mid quotes at page 16 of its Petition, *Great Atlantic and Pacific Tea Co.* v. *Brasileiro*, 159 F.2d 661, 665 (2nd Cir., 1947) antedates both *United States Gypsum* and *McAllister* and is just simply not the law. Findings which combine both fact and law are outside the scope of the clearly erroneous standard rule only where there is a question as to the legal principle involved. 5A Moore's Federal Practice ¶ 52.03 [2] at page 2664. Here, petitioner's objections are not to any legal rulings made by the District Court, but to its decision on the facts; as to these, Rule 52(b) of the Federal Rules of Civil Procedure and the clearly erroneous rule apply.

III.

THE FINDINGS OF THE DISTRICT COURT WERE NOT INTERNALLY INCONSISTENT IN ANY SIGNIFICANT MANNER AND THEREFORE WERE NOT CLEARLY ERRONEOUS.

For its fifth argument, Aunt Mid seizes upon isolated language in the Court of Appeals' opinion remarking upon some confusion in the District Court's findings as to whether cabbages spoil at 32, 40 or 45 degrees and then

argues that these remarks demonstrate a recognition of an internal inconsistency in the District Court's findings which compels the conclusion that such findings were clearly erroneous.

In fact, whether the cabbages spoiled at 32, 40 or 45 degrees was, on the facts of this case, not a matter of significance since the likelihood at the outset of the voyage was that the cabbages would be subjected to temperatures far in excess of 45 degrees and this was, in fact, the case. The Court of Appeals correctly confined its decision to matters that had some relevance to the final result and affirmed.

IV.

NO PRIOR DECISION OF THE SUPREME COURT WARRANTS OR COMPELS A DIFFERENT DECISION THAN THAT REACHED BY THE DISTRICT COURT AND AFFIRMED BY THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In Petitioner's sixth argument, it contends the Court of Appeals disregarded the Supreme Court's decisions in *Schnell* v. *The Vallescura*, 293 U.S. 296 (1934) and *Missouri & Pacific R.R. Co.* v. *Elmore & Stahl*, 377 U.S. 134 (1964). At page 19 of its Petition, Aunt Mid attempts to mislead the Court by deleting from language quoted from *The Vallescura*, that utterance of the Court applicable to this case. The Court stated:

> "It is commonly said that when the carrier succeeds in establishing that the injury is from an excepted cause, the burden is then on the shipper to show that that cause would not have produced the injury but for the carrier's negligence in failing to guard against it. Such we may assume the rule to be, at least to the extent of requiring the shipper to give evidence of

negligence where the carrier has sustained the burden of showing that the immediate cause of the loss or injury is an excepted peril. [citing cases]" 293 U.S. 203, 305.

The carriers proved the damage was caused by the fault of the shipper in that he shipped perishable cabbages in non-refrigerated cargo holds in order to save freight when he had been advised against this by his partner who purchased the cabbages. Aunt Mid attempted to raise some doubt about the way the carriers stowed the cabbage: conflicting testimony was heard from experts on each side; and, the issue was resolved against Aunt Mid.

Having proved the cause of the damage was the fault of the shipper, an excepted cause under 46 U.S.C. §1304(i), the carriers did not have to go further and disprove every other possibility however improbable, speculative or remote. *The Vallescura,* supra, *Lekas & Drivas, Inc.* v. *Goulandris,* 306 F.2d 426 (2nd Cir. 1962), *Schroeder Bros.* v. *The Saturnia,* 123 F.Supp. 282, aff'd 226 F.2d 147 (2nd Cir. 1955), *George F. Pettinos, Inc.* v. *American Export Lines,* 68 F.Supp. 759, 761 aff'd 159 F.2d 247 (3rd Cir. 1947).

In *Missouri Pacific R.R. Co.* v. *Elmore & Stahl,* 377 U.S. 134, a jury in Texas found that "inherent vice" was not the sole cause of the decay of a carload of honeydew melons, as pleaded by the rail carrier, thus leaving the inference that the carrier's neglect contributed. In this case the District Court found the cause of the loss to be the fault of the shipper and further found that the cabbages were properly stowed on the PRA RIVER and SIREFJELL and that these vessels were seaworthy in all respects. The cases are inapposite on their facts. In any event, the carriers in this case proved they properly

stowed and carried the cabbages even though this was not their burden once they proved the sole cause of the loss to be the shipper's fault.

The conclusions advanced by Aunt Mid at pages 20, 21 and 22 of its Petition are simply not true. The trial judge who heard the evidence in the utmost detail over a period of five days and had no interest whatever in the outcome is a more reliable arbiter of the evidence than the Petitioner's counsel.

CONCLUSION

This case is concerned with cabbages purchased by plaintiff at a cost of $3,000.00 which plaintiff's president, against expert advice, elected to ship across the Atlantic Ocean in April and May without refrigeration. The case took a week to try in the District Court. The District Court's decision was then thoroughly and conscientiously reviewed by the Court of Appeals for the Seventh Circuit.

The questions presented, which are essentially factual and relatively unimportant, have already been passed upon by two lower courts and correctly decided. It is respectfully submitted the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JONATHAN G. BUNGE
MICHAEL A. SNYDER
Attorneys for the Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 68 C 1796) * *
* * (Caption—No. 68 C 1797) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

These two consolidated cases came on regularly for trial on May 27, 1970, before the Court sitting without jury, Zeamore A. Ader and David L. Ader appeared as counsel for the plaintiff and Michael A. Snyder and Jonathan G. Bunge appeared as counsel for the defendants in cases 68 C 1796 and 68 C 1797, respectively.

With the exception of portions of the depositions of Helge Vikan, Chief Officer of the M/V SIREFJELL, and Johannes J. F. deJong, a supercargo who attended the loading of the M/V PRA RIVER, all the evidence was received through the testimony of witnesses appearing in person and such exhibits as were offered by the parties.

The Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted for decision, and the Court, being fully advised in the premises, makes its findings of fact as follows:

FINDINGS OF FACT

The Court finds:

1. These are maritime and civil causes of action to recover money damages for the spoilage of two shipments of cabbages.

2. The plaintiff in each of the cases, Aunt Mid., Inc., is an Illinois corporation with its offices and principal place of business in Chicago, Illinois. The plaintiff is in

the business of preparing and packaging fresh vegetables for domestic consumption.

3. Fjell-Oranje Lines is an operating trade name for a joint ocean shipping service comprised of Fjell-Line of Oslo, Norway and Oranje Lijn (Maatschappij Zee Transport) N.V. of Rotterdam, The Netherlands. Fjell-Oranje was at all material times a time charterer of the Norwegian Motor Vessel SIREFJELL and Oranje Lijn was at all material times a time charterer of the Ghanian Motor Vessel PRA RIVER.

4. Great Lakes Overseas, Inc. was at all material times the agent in Chicago, Illinois, for the Fjell-Oranje Lines. Although named a party defendant in these actions, this defendant was neither served with process nor did it appear.

5. In the fall of 1966 the plaintiff entered into an agreement with Suffolk Farms Packing Co. of Chelsea, Massachusetts to purchase cabbages of the Danish variety from producers in The Netherlands. The cabbages were to be used in the manufacture of cole slaw which was to be sold to various super market chains. The president of Suffolk Farms was Arnold Wolf. Mr. Wolf was also a principal in the firm of Wolf & Wolf N.V., Amsterdam, The Netherlands.

6. Mr. Arnold Wolf of Wolf & Wolf N.V., as the agent of the plaintiff, purchased 100 net tons of cabbages for the plaintiff in Holland in October of 1966. These cabbages were part of a total of 400 tons purchased by Wolf & Wolf N.V., as agent, from a farmer and a produce dealer. The cabbages were stored in Holland over the Winter of 1966-1967.

7. In the Spring of 1967, the plaintiff through its president, Mr. Russel LaMantia, explored the costs of packaging the cabbages and shipping them from Holland to Chicago. He was advised by Arnold Wolf that a saving of forty cents per fifty pounds ($16.00 per ton) could be made by shipping the cabbages in mesh bags rather than

crates (D. Ex. 2). Mr. Wolf also advised Mr. LaMantia that he had experienced more shrinkage in bags than crates (D. Ex. 2) and that bruising per unit had been noted to be four per cent in crates as opposed to nine per cent in bags (D. Ex. 6).

8. In exploring the cost of shipping the cabbages from Holland to Chicago, Mr. LaMantia contacted Great Lakes Overseas and was advised that the cost of shipping the cabbages under refrigeration would be $81.00 per metric ton and the cost of shipment in ventilated hold storage without refrigeration would be $55.00 per metric ton (D. Ex. 1).

9. On March 27, 1967, Mr. Arnold Wolf wrote Mr. LaMantia stating that:

> "Wolf & Wolf is of the opinion that cabbage to the the Great Lakes with a voyage of three weeks should be shipped under refrigeration . . ."
> "At any rate, you should bear in mind that there is a certain risk involved, while under refrigeration you will practically have no risk. The decision and responsibility is of course entirely yours." (D. Ex. 7).

10. Notwithstanding the advice of Arnold Wolf, who testified on behalf of the plaintiff as to having acquired broad experience in the exportation and importation of fresh produce, including cabbages, over a period of thirty years, Mr. LaMantia elected to package the cabbages in mesh bags rather than crates and to ship them in ventilated hold stowage rather than under refrigeration. The savings effected by the choice to ship the 100 tons in ventilated stowage rather than under refrigeration resulted in a saving to the plaintiff of $26.00 per ton or one and three tenths of a cent per pound of cabbage.

11. Great Lakes Overseas, Inc. requested confirmation from the plaintiff that the cabbage would survive such a voyage to the Great Lakes. On March 21, 1967, Mr. LaMantia wrote Great Lakes Overseas, Inc. and advised

them that the cabbage would carry in a ventilated hold for a period of 21 days, and confirmed his understanding that the temperature would not be below 32 degrees Fahrenheit (P. Ex. 1-A)

12. On April 15, 1967, forty net tons of the cabbages were delivered to the M/V PRA RIVER at Rotterdam and Fjell-Oranje Lines issued its bill of lading No. 23. that same day. The bill of lading recited that the goods were received in "apparent good order and condition" and was claused "HOLD STOWAGE" (P. Ex. 6).

13. On April 21, 1967, twenty net tons of cabbages were delivered to the M/V SIREFJELL at Rotterdam and Fjell-Oranje Lines issued its bill of lading No. 23. The bill of lading recited the goods were received in "apparent good order and condition" and was also claused "HOLD STOWAGE" (P. Ex. 2).

14. The forty tons of cabbages shipped on the M/V PRA RIVER were packed in 1,800 mesh bags. 492 of these bags were stowed in No. 3 lower hold and 1,308 were stowed in No. 4 lower hold. In each hold the bags were stowed on top of palletized baler twine. There were sheets of one inch thick plywood separating the cabbages from the baler twine and from the structural parts of the vessel. Captain Ragnar Sognnes, an experienced marine surveyor, and Captain Harry J. Crijnen, a licensed master, former chief officer and cargo superintendent, testified on behalf of the defendants. Both testified that the bags of cabbages were loosely stowed approximately five bags in height and that nothing was stowed on top of the cabbages. In their opinions the cabbages were stowed as well as they could have been. They were well below the weather deck which is exposed to the sun, and they were stowed in line with the flow of air through the ventilation ducts in each hold. Mr. LaMantia, who had seen the cabbages in stow, admitted on cross examination that they were "neatly stacked." The Court accepts the testimony of Captain Sognnes and Captain Crijnen that the 1,800 bags of cabbages were well and properly stowed in the customary manner aboard the PRA RIVER.

15. The ship's ventilation system was operated in the presence of Captain Sognnes who found the system to be adequate and providing a good draft of outside air.

16. The cabbages were discharged from the M/V PRA RIVER May 8 and 9, 1967. At this time the cabbages were badly decayed, having numerous black spots on their outer leaves and having a rotten odor. Mr. La Mantia requested an inspection by the United States Department of Agriculture. A certificate of condition was issued by the Department of Agriculture inspector stating that "all heads showed decay, Bacterial Soft Rot, in all stages mostly advanced, affecting two to four head leaves and some entire heads." He found the pulp temperature of the various cabbages ranged from 51 degrees to 54 degrees Fahrenheit on May 9, 1967 (D. Ex. 9). The air temperature in Chicago on that day ranged between 41 and 63 degrees with an average of 52 (D. Ex. 18).

17. The twenty tons of cabbages shipped on board the SIREFJELL were packed in 900 mesh bags and were stowed in the No. 5 refrigeration or "reefer" compartment of the vessel. This compartment was constructed in such a way that goods could be carried either using forced draft ventilation or under refrigeration. Captain Sognnes testified that the bags of cabbages were loosely stowed approximately five bags in height allowing adequate ventilation. Captain Sognnes also stated the cabbages were neatly stacked and that nothing was stowed on top of them. In his opinion, the stowage of the cabbages was "good." The Court accepts the testimony of Captain Sognnes that the 900 bags of cabbages were well and properly stowed in the customary manner aboard the SIREFJELL.

18. The SIREFJELL left Rotterdam on April 21, 1968. The ventilation equipment in the No. 5 "reefer" compartment was used until the vessel had been at sea for seven days. At this time the Captain, Chief Officer and Chief Engineer smelled the odor of spoiling cabbages coming from the ventilators leading to the No. 5 "reefer" com-

partment. Refrigeration was then applied and continued throughout the remainder of the voyage to Chicago, except for periods of a few hours in Montreal and Cleveland. A temperature of between 5 and 8 degrees Centigrade (40 to 46 degrees Fahrenheit) was maintained.

19. The ventilation available in the No. 5 "reefer" compartment was described in detail by the Chief Officer of the SIREFJELL, Helge Vikan, and provided a continuous supply of circulating fresh air. The ship's ventilation system was also operated in the presence of Captain Sognnes who found the system to be good and providing a good draft of outside air. The Court finds that the ventilation provided the cabbages was in all respects proper and of the usual and customary type provided goods carried in ventilated hold storage.

20. The SIREFJELL arrived in Chicago on May 17, 1967. The cabbages in the No. 5 "reefer" compartment were badly decayed and discolored with black spots. The cabbages from the SIREFJELL were discharged the following day, on May 18, 1967, and at that time were inspected by an inspector from the United States Department of Agriculture. The cabbages were decayed and suffering from "Bacterial Soft Rot and Watery Soft Rot in all stages, mostly advanced affecting from 1 to 4 outer leaves or the butt" (D. Ex. 8). The inspector also found the temperature control system of the SIREFJELL was operable. The pulp temperatures of the cabbages taken from the SIREFJELL on May 18, 1967 ranged from 60 to 65 degrees Fahrenheit while the air temperature was in excess of 80 degrees Fahrenheit.

21. Both the PRA RIVER and SIREFJELL shipments were condemned by inspectors of the Pure Food and Drug Administration and destroyed.

22. Several photographs were taken of the cabbages discharged from each vessel by both Captain Sognnes (D. Exs. 10 to 13) and Joseph T. Wilkinson of Toplis &

Harding, Inc., who surveyed on behalf of the plaintiff (P. Exs. 23 to 32). When shown United States Department of Agriculture Handbook No. 184, Market Diseases of Cabbages, Cauliflower, Turnips, Cucumbers, Melons and Related Crops (D. Ex. 17), Mr. Wilkinson identified photograph (B) appearing on Plate 1 as being most typical of the condition he observed. This photograph depicted a head of cabbage affected with alternaria rot. Captain Sognnes took a close-up photograph of a head of cabbage which he identified as being representative of the average condition of the PRA RIVER cabbages (D. Ex. 20). Referring to this photograph, Malcolm C. Schurtleff, PhD., an expert plant pathologist who testified for the plaintiff on rebuttal stated on direct examination that the cabbage depicted was affected with alternaria rot.

23. The unrebutted testimony of Glen B. Ramsey, PhD., an expert plant pathologist who testified on behalf of the defense, was that alternaria rot, bacterial soft rot and watery soft rot are caused by bacterial organisms found in the soil or in the atmosphere, and that cabbages affected by these conditions in their early stages could easily pass by the ordinary observer without being noticed.

24. Dr. Schurtleff testified that bacterial soft rot is caused by a parasitic bacteria which enters plants which have been previously diseased, cut, bruised or otherwise injured.

25. Dr. Schurtleff testified that the pulp temperatures of cabbages not subjected to ventilation would generally exceed that of the outside air by 15 to 20 degrees, and that pulp temperatures of rotting cabbages in excess of 100 degrees was not uncommon. The cabbages were discharged in Chicago with pulp temperatures no greater than that of the outside air. In the case of the SIREFJELL, the temperatures on the day following discharge were twenty degrees less than that of the outside air, as refrigeration had been applied to these cabbages when their rotting odor was first noted.

26. From the Pilot Chart of North Atlantic Ocean for April (D. Ex. 22), Captain Sognnes traced the route to be followed from Rotterdam to the Gulf of St. Lawrence and showed the average April temperatures along that route range between 32 and 54 degrees. Captain Gabriel V. Dodd, testifying as an expert on behalf of the plaintiff, stated on cross examination that the temperatures to be expected by the M/V SIREFJELL on her crossing would reach 65 degrees.

27. Both expert plant pathologists agreed that the bacteria causing decay would remain dormant at 32 degrees and that up to 40 degrees development would be retarded. Above 40 degrees, however, the bacteria causing decay develop rapidly and reproduce on a geometric progression at a rate directly proportionate to the increase in temperature. Captain Dodd, Dr. Ramsey and Dr. Schurtleff testified that the usual and customary industry practice is that, to prevent the development of bacteria causing decay, shipments to distant markets are refrigerated to at least 40-45 degrees Fahrenheit during transit.

28. The Court accepts the foregoing testimony and finds that the cause of the decay of the cabbages was their infection with bacteria causing alternaria rot, bacterial soft rot and watery soft rot prior to shipment aboard the M/V PRA RIVER and M/V SIREFJELL and their inherent quality to spoil and decay at temperatures above 40 degrees Fahrenheit due to the growth of these bacteria, and that these causes are sufficient to account for the loss. The Court further finds that these bacteria were either dormant or in an early stage of development when loaded aboard these vessels so that the presence of the infection was not apparent to the defendant carriers.

The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this Court to be true in all respects.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter and of the parties to this action.

2. The law applicable to this case is to be found in the Carriage of Goods By Sea Act, approved April 16, 1936, 46 U.S.C. §§1300-1315.

3. This Act affords certain enumerated defenses to the carrier, the following of which have been pleaded by each of the defendants:

> "1304(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . .
>
> (i) Act or omission of the shipper or owner of the goods, his agent or representative; . . .
>
> (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods . . ."

These defenses together with those of insufficiency of packing (§ 1304(2) (N)) and insufficiency or inadequacy of marks (§ 1304(2) (O)) are all related to the fault of the shipper or defects in the cargo and arise out of considerations of simple justice. The Law of Admiralty, Gilmore and Black, 1957, p. 145.

4. Concerning the first of these defenses, that the damage resulted from an "act or omission of the shipper," the evidence shows that the plaintiff compared the freight rates applicable to ventilated hold and refrigerated stowage; then, against the advice of its agent, Mr. Wolf, and contrary to the usual and customary industry practice, it elected to take the risk of shipping the goods in ventilated hold stowage in order to save $1,560.00 in freight rates. The plaintiff represented to the vessel's agent that the goods would carry in ventilated space for a period of twenty-one days; that they would not was evident from the condition of the goods at discharge. Had the plaintiff elected to ship the goods under refrigeration at ap-

proximately, but not lower than, 32 degrees, the loss would not have occurred. Dr. Ramsey characterized the act of shipping the cabbages without refrigeration as a "gamble" and stated that he "would not expect them to hold up."

The plaintiff gambled when he shipped the cabbages in a ventilated hold rather than under refrigeration. This act, together with the tendency of the goods to spoil at temperatures in excess of 40 degrees, caused the loss. The temperatures to which the cabbages were exposed in the course of ocean transit must be deemed the risk of the shipper since it elected not to contract for refrigeration in transit and the shipper must bear the consequences of its decision. Commodity Service Corp. v. Boston Insurance Co., 1964 A.M.C. 926, 939 (S.D.N.Y. 1964); affirmed sub nom. Commodity Service Corp. v. Hamburg-American Line, 354 F.2d 234 (2d Cir. 1965). The carriers were under no obligation to do other than to see that the goods received the usual and customary degree of care afforded such goods in the stowage and carriage requested by the shipper. The shipping of the cabbages in a ventilated hold constituted an act of omission of the shipper or owner of the goods within the meaning of 46 U.S.C. § 1304(2) (i).

5. The defendants' bills of lading reciting receipt of the cabbages "in apparent good order and condition" do not establish the good order of this cargo since they refer only to the external condition of the cargo, and do not refer to the possibility of inherent defects such as the bacteria and organisms which caused the decay. Commodity Service Corp. v. Boston Insurance Co., supra; Thomas Roberts & Co. v. Calmar S.S. Co., 1945 A.M.C. 375, 59 F. Supp. 203, 207 (E.D. Pa. 1945); Niel Maersk, 1937 A.M.C. 975, 91 F. 2d 932 (2 Cir. 1937), cert. denied 302 U.S. 753; Albers Bros. Milling Co. v. Hauptman, 1938 A.M.C. 752, 95 F.2d 286 (9 Cir. 1938).

6. The burden of proof lies with the plaintiff to show that the goods were in fit internal order and condition to survive the voyage for which they were booked. Commodity Service Corp. v. Boston Insurance Co., and Hamburg-

American Line, supra; American Tobacco Co. v. Katingo Hadjipatera, 81 F. Supp. 438, 446 (S.D.N.Y. 1948), modified and affirmed as modified, 194 F. 2d 449, cert. denied 343 U.S. 978 (1952); Hecht, Levis & Kahn, Inc. v. The S.S. President Buchanan, 1956 A.M.C. 1970, 236 F. 2d 627 (2d Cir. 1956); Gothic Star, 1933 A.M.C. 1048, 4 F. Supp. 240 (S.D.N.Y. 1933). There was no credible evidence tending to prove the cabbages were fit to survive a voyage where temperatures in excess of 40 degrees were to be expected and the overwhelming evidence is to the contrary.

7. The cabbages were properly stowed and carried on both the PRA RIVER and SIREFJELL and these vessels were seaworthy in all respects.

8. The complaints are to be dismissed with prejudice and with costs to the defendants.

/s/ R. B. Austin
United States District Judge

DATED: June 24, 1970

CERTIORARI DENIED